Supreme Court, U.S.
FILED

No. _____

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In The OFFICE OF THE CLERK

Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fifth Circuit's Rule 60(b)(1) "excusable neglect" analysis conflict with *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993), which requires a district court to consider multiple and specific factors?

LIST OF PARTIES

1. Ingrid Felderhof, Petitioner
2. Jenkens & Gilchrist, P.C., Respondent
3. John Felderhof, Respondent
4. Groia & Company, Respondent

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
Factual Background	2
Proceedings Below	6
ARGUMENT	8
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	21

APPENDIX

Opinion of the United States Court of Appeals Dated August 12, 2009	App. 1
Order of the United States District Court for the Southern District of Texas Dated October 1, 2008	App. 3
Opinion of the United States Court of Appeals Dated August 26, 2008	App. 11

TABLE OF CONTENTS – Continued

Page

Final Judgment of the United States District Court for Southern District of Texas Dated January 10, 2007 ..... App. 32

Order of the United States Court of Appeals Denying Petition for Rehearing Dated September 14, 2009 ..... App. 35

TABLE OF AUTHORITIES

Page

CASES

Feeney v. AT&E, Inc., 472 F.3d 560 (8th Cir. 2006) 10, 11

In re Dierschke, 975 F.2d 181 (5th Cir. 1992) ... 11, 12, 13

Jenkens & Gilchrist v. Groia & Company, 542 F.3d 114 (5th Cir. 2008) (*"Jenkins I"*) ..... *passim*

Jenkens & Gilchrist v. Groia & Company, Cause No. 08-20642 (5th Cir. Aug. 12, 2009) (*"Jenkins II"*) ..... *passim*

Lemoge v. United States, __ F.3d __, 2009 WL 4546727 (9th Cir. Dec. 7, 2009) 9, 11

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993) ..... *passim*

Union Pacific Railroad Company v. Progress Rail Services Corporation, 256 F.3d 781 (8th Cir. 2001) 10, 11

STATUTES

28 U.S.C. § 1254(1) 1

RULES

Bankruptcy Rule 9006(b)(1) 8, 9

Federal Rule of Civil Procedure 60(b)(1) ..... *passim*

OPINIONS BELOW

Jenkens & Gilchrist v. Groia & Company, 542 F.3d 114 (5th Cir. 2008) (*"Jenkens I"*); and

Jenkens & Gilchrist v. Groia & Company, Cause No. 08-20642 (5th Cir. Aug. 12, 2009) (*"Jenkens II"*).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 12, 2009. Petitioner filed a Motion for Rehearing, which was denied on September 14, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b)(1):

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect.

STATEMENT

Factual Background

John Felderhof, a former officer of Bre-X, retained Jenkens & Gilchrist, P.C. ("Jenkens") to represent him in certain legal matters. To *secure* payment of its fees, Jenkens instructed Ingrid Felderhof, his former wife, to transfer to Jenkens her stock in Travis Close, Inc. (which would give Jenkens possession of her residence located in Williamsburg, Virginia). Jenkens promised Ms. Felderhof that it would return the residence to her so long as Jenkens' fees were fully paid. For approximately ten years, Jenkens maintained the residence as security for its fees.

On September 8, 2006, after Ms. Felderhof paid all of Jenkens' fees (more than $2.2 million), Ms. Felderhof asked Jenkens to return the residence as promised. Jenkens refused. On September 20, 2006, Ms. Felderhof again wrote to Jenkens, demanding it to return the residence. Jenkens again refused. Jenkens explained its position in a letter dated October 26, 2006, but not faxed to Ms. Felderhof until November 9, 2006. Jenkens represented that it " . . . *is not claiming any interest in the house* . . . " and that it was "in the difficult and untenable position of having conflicting and competing claims regarding the property."[1] Jenkens stated that if no agreement

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[1] According to Jenkens, Ms. Felderhof's ex-husband and his Canadian Counsel (Groia & Company) also asserted a claim to the residence.

was reached *by December 4, 2006*, it would file an interpleader action.

On November 14, 2006, Ms. Felderhof responded to Jenkens' November 9, 2006 letter. The same day, Jenkens filed an interpleader lawsuit in the United States District Court for the Southern District of Texas. Jenkens pled that it "is at risk of being subject to double or multiple liability, conflicting claims and judgments from various courts regarding the ownership of Travis Close Inc. and its sole asset, the Residence."

On November 16, 2006, Ms. Felderhof was handed legal papers while in the Cayman Islands, where she resides. The same day, she brought them to the office of her Cayman attorney, who was, at that time, out of the country. When her attorney returned on November 28, 2006, he reviewed the documents delivered in his absence. The documents consisted of a fifty-three page complaint and exhibits, but did not include a summons or a deadline for answering.

Within days of her attorney's return to the Island, Ms. Felderhof received papers indicating that a pre-trial scheduling conference had been scheduled for February 14, 2007. Ms. Felderhof diligently notified her attorney of the notice. Aware of no other summons or command to appear in court, Ms. Felderhof and her attorney believed the notice of the pre-trial scheduling conference provided Ms. Felderhof with her opportunity to respond to the lawsuit. Ms. Felderhof swore in her uncontroverted affidavit she

planned to appear for the scheduling conference. No evidence to the contrary exists.

Importantly, the Cayman Island Postal Service does not make deliveries to physical addresses. Rather, all mail to Island residents must be addressed to a specific post office box number and must include the correct postal office code. According to the Cayman Island Postal Service, all misaddressed mail is promptly returned to the sender. Before Jenkens sued Ms. Felderhof, Jenkens addressed its mailings to Felderhof's P.O. Box using the correct post office code. However, after Ms. Felderhof demanded the return of her residence, Jenkens began addressing motions and court notices to an invalid mailing address, assuring non-delivery.

The summons Jenkens claims was served on Ms. Felderhof on November 16, 2006 stated that an answer must be filed in thirty days, *i.e.*, by December 16, 2006. On Friday, December 15, 2006, before an answer was even due, Jenkens filed a "request for entry of default." Jenkens' Certificate of Service does not include a P.O. Box or post office code. Ms. Felderhof never received Jenkens' filing.

On Monday, December 18, 2006, the district court signed an order setting Jenkens' request for entry of default for hearing on January 5, 2007. The trial court judge instructed Jenkens' counsel on that date to issue a notice of the January 5 hearing to Ms. Felderhof. Jenkens waited until December 27, 2006 to send its notice, and, once again, failed to include a

P.O. Box or post office code. Ms. Felderhof never received Jenkens' request for entry of default or its notice of the January 5, 2007 hearing.

On January 5, 2007, over one month before the pre-trial scheduling conference was to occur, the district court asked Jenkens' counsel whether it placed Ms. Felderhof on notice of the January 5 hearing. Jenkens' counsel stated that it provided notice in the best manner it could. Of course, no proof of delivery was presented. The district court then granted Jenkens' request for entry of default. Three days later, Jenkens filed a motion for summary judgment, and, contrary to its earlier representation that it was not claiming an interest in the residence, sought a declaration that it is its sole owner. The Certificate of Service on Jenkens' motion does not include a P.O. Box or post office code. The district court granted Jenkens' motion the day after it was filed.

Ms. Felderhof first received notice of the default judgment (by a Canadian journalist) on or about January 11, 2007. This was the first notice Ms. Felderhof or her Cayman attorney received that would show proceedings were underway in the lawsuit. She immediately obtained local Texas counsel and undertook substantial efforts to vacate the default taken against her by her former attorneys.

Proceedings Below

Ms. Felderhof filed a motion for relief from the default under Rule 60(b)(1). Under the Fifth Circuit's current "excusable neglect" test, Ms. Felderhof established that she has meritorious defenses to all of Jenkens' claims; that Jenkens would not be prejudiced by setting aside the default judgment; and that she did not act willfully. Ms. Felderhof also established that other considerations weighed in her favor, including her prompt motion, the amount in dispute and the fact that the proceedings involving real property resulted in a forfeiture of her residence.

On April 2, 2007, the district court denied Ms. Felderhof's motion without conducting an evidentiary hearing or offering any explanation or analysis. Ms. Felderhof appealed. In *Jenkens I*, the Fifth Circuit held that Ms. Felderhof has meritorious defenses; Jenkens would not be prejudiced by setting aside the default; and other factors weighed in favor of setting aside the default. (App. 23-26). The Fifth Circuit held: "[W]e must also assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their responsive duties under the circumstances;" "[b]ecause there are no countervailing equities (*i.e.*, because Jenkens has not presented a legitimate claim of prejudice that would arise from setting aside the default), 'any doubt should, as a general proposition, be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits.'" (App. 29-30). The Fifth Circuit remanded the case. (App. 31).

On October 1, 2008, on remand, the district court again denied relief, only this time it entered a seven-page order explaining its findings. (App. 3-10). The district court declined to consider any factor other than whether Ms. Felderhof acted "willfully." (App. 7). The district court found that the default was willful based on its determination that (1) Ms. Felderhof refused to communicate with Jenkens beginning in mid-October 2006 (*e.g.*, she refused a Federal Express package; she instructed her attorneys to destroy communications regarding the litigation and not to provide forwarding information to Jenkens); (2) Ms. Felderhof was actually aware of the summons but chose to act as though she were not served with a summons; (3) Ms. Felderhof disregarded court notices and Jenkens' filings (the only specific example cited in the order was the notice to appear at the January 5th hearing on the motion for entry of default); and (4) the court "doubts" Ms. Felderhof "seriously planned" to appear at the February pre-trial scheduling conference in light of the absence of evidence concerning such things as travel arrangements and the lack of filing a certificate of interested parties. (App. 7-10). Ms. Felderhof appealed.

In *Jenkens II*, Ms. Felderhof established that each of the district court's factual findings conflict with the record and also conflict with the Fifth Circuit's opinion in *Jenkens I*. The Fifth Circuit, however, affirmed without saying why. (App. 1-2).

ARGUMENT

REASONS FOR GRANTING THE PETITION

In *Jenkens II*, the Fifth Circuit affirmed the district court's order which fails to apply or even mention the controlling excusable neglect factors this Court adopted in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993). Relying on pre-*Pioneer* case law, the Fifth Circuit deems the *Pioneer* factors inapplicable, causing a conflict with other Circuits which have followed *Pioneer*. This Court should accept Certiorari and create uniformity among the Circuits with respect to the excusable neglect factors that must be considered in the context of a Rule 60(b)(1) analysis.

A. The Fifth Circuit's Rule 60(b)(1) analysis conflicts with this Court's determination that "excusable neglect" requires consideration of multiple factors and elements.

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489 (1993), the Supreme Court analyzed the factors that must be considered by a lower court in the context of a motion filed under Bankruptcy Rule 9006(b)(1) – a rule which permits equitable relief from a creditor's failure to file a timely

proof of claim based on an excusable neglect standard. The Court noted, initially, that Rule 9006(b)(1) has certain commonalities with Rule 60(b)(1) of the Federal Rules of Civil Procedure. *Id.* at 393. Among other things, both statues permit relief from judgments or orders based on a showing of "excusable neglect," yet neither rule defines the phrase. The Supreme Court held:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an *equitable one*, taking account of *all relevant circumstances* surrounding the party's omission. These include, as the Court of Appeals found, [1] the danger of prejudice to the debtor, [2] the length of delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.

Id. at 394 (bracketed items added) (emphasis added).

Following *Pioneer*, Circuits have recognized that these factors apply equally to motions filed under Rule 60(b)(1) seeking relief from judgments. Most recently, in *Lemoge v. United States*, __ F.3d __, 2009 WL 4546727 (9th Cir. Dec. 7, 2009), for example, the Ninth Circuit held that it is an abuse of discretion for the district court to not apply *all* of the *Pioneer* factors when analyzing excusable neglect under Rule 60(b)(1). *Id.* at *2.

Similarly, in *Feeney v. AT&E, Inc.*, 472 F.3d 560 (8th Cir. 2006), the Court held that "[t]he determination of excusable neglect 'is at bottom an equitable one, taking account of *all* relevant circumstances surrounding the party's omission." *Id.* at 564 (emphasis added). The Court held that the "relevant circumstances" are the four factors this Court adopted in *Pioneer*. *See id.*

In *Union Pacific Railroad Company v. Progress Rail Services Corporation*, 256 F.3d 781 (8th Cir. 2001), the Court held:

> In deciding whether to set aside a default judgment for "excusable neglect," a district court ought not focus narrowly on the negligent act that caused the default and ask whether the act was itself in some sense excusable. Instead, the court should take account of "all relevant circumstances surrounding the party's omission," *Pioneer Investment*, 507 U.S. at 395, 113 S.Ct. 1489. The inquiry is essentially an equitable one, and *the district court is required to engage in a careful balancing of multiple considerations*, including "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." We have applied these principles regularly since the Supreme Court laid them out in *Pioneer Investment*. We have also concluded that "the existence of

> a meritorious defense continues to be a relevant factor," in deciding these kinds of cases after Pioneer Investment.

Id. at 782-83 (internal citations omitted). The Court concluded that the district court's failure to weigh all of the *Pioneer* factors was an abuse of discretion.

Cases such as *Lemoge*, *Feeney*, and *Progress Rail Services Corporation* represent a correct application of *Pioneer*, which emphasized that "excusable neglect" is an equitable concept that is grounded in many considerations that go well beyond whether the district court believes the defaulting party acted with or without good faith. Consistent with *Pioneer*, these Circuits require *each* factor to be carefully weighed.

The Fifth Circuit has not adopted the *Pioneer* factors, and, under its test, a district court is ***not*** required to consider any combination of factors. Generally, the Fifth Circuit examines "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992). The Fifth Circuit has also stated that a district court may consider whether the public interest was implicated, whether there was significant financial loss to the defendant, and whether the defendant acted expeditiously to correct the default. *See id.* at 183-84. However, as the Fifth Circuit stated in *Jenkens I*, "[t]he district court need not consider all of the above factors in ruling on a defendant's 60(b)(1)

motion; the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause.'" *Id.* at 119 (citing *Dierschke* at 184). Moreover, under the Fifth Circuit's test, the "court has the discretion to refuse to set aside a default judgment under 60(b)(1) if the defendant" (1) "fails to present a meritorious defense sufficient to support a finding on the merits for the defaulting party," or (2) "if a district court finds a defendant's default to be willful." *Id.* at 120 (citing *Dierschke*, 975 F.2d at 184). In the case of the latter, "the district court need not make any other finding." *Id.*

The Fifth Circuit's Rule 60(b)(1) "excusable neglect" analysis conflicts with *Pioneer*. The Fifth Circuit's analysis is problematic because the equitable factors from *Pioneer* that this Court held define "excusable neglect" are completely overlooked; a district court is not required to focus on any particular factor; and, if a district court believes a defaulting party acted without good faith (one of several elements from *Pioneer*), a default stands notwithstanding the possibility that every other *Pioneer* factor weighs in favor of permitting the party to answer the lawsuit.

That scenario is presently before this Court.

In *Jenkens I*, the Fifth Circuit established the law of this case that (1) Ms. Felderhof had meritorious defenses to Jenkens' claims; (2) Jenkens would not be prejudiced by setting aside the default;

(3) Ms. Felderhof acted promptly to set aside the default; and (4) the amount in controversy – a Williamsburg residence, real property valued at over $1 million – weighed in favor of granting relief. The Fifth Circuit was unable to determine whether the evidence showed willfulness or not; though it noted: "While there is evidence suggestive of willfulness on the party of Ms. Felderhof, resolving doubt in Ms. Felderhof's favor, we do not believe the record conclusively shows that her default was willful." (App. 29). The Fifth Circuit remanded the case and gave the district court the option of making written findings, which the district court neglected to do prior to the first appeal.

On remand, the district court commenced its analysis by framing the issue narrowly. Citing *In re Dierschke*, a Fifth Circuit case decided one year before *Pioneer*, the district court held that if it "determines defendant was willful in not responding to the claims against her, no other finding is required." (App. 7). The district court determined Felderhof's default was "willful," and failed to consider or mention any other factor, including the factors the Fifth Circuit had previously determined in *Jenkens I* weighed in favor of setting aside the default. In *Jenkens II*, the Fifth Circuit affirmed, without giving a reasoned opinion.

Not only is the district court's willfulness finding erroneous (as discussed in the next section), the district court was required to consider the danger of prejudice to Jenkens; the length of delay and its

potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. The district court's failure to consider the applicable factors was a clear abuse of discretion. The district court and the Fifth Circuit's "excusable neglect" analysis is completely at odds with the *Pioneer* factors and the Circuits which have adopted it. Accordingly, this Court should grant Certiorari.

B. *Jenkens II* must be reversed because the district court's impermissibly-narrow analysis is a clear abuse of discretion.

In denying Ms. Felderhof's motion for a second time, the district court held she defaulted willfully based on the court's finding that (1) Ms. Felderhof refused to communicate with Jenkens beginning in mid-October 2006 (*e.g.*, she refused a Federal Express package; she instructed her attorneys to destroy communications regarding the litigation and not to provide forwarding information to Jenkens); (2) Ms. Felderhof was actually aware of the summons but chose to act as though she were not served with a summons; (3) Ms. Felderhof disregarded court notices and Jenkens' filings (the only specific example cited in the order was the notice to appear at the January 5th hearing on the motion for entry of default); and (4) the court "doubts" Ms. Felderhof "seriously planned" to appear at the February pre-trial scheduling conference in light of the absence of evidence

concerning such things as travel arrangements and the lack of filing a certificate of interested parties. (App. 7-10). Each and every factual finding contained within the district court's order is factually and legally erroneous.

Finding: Ms. Felderhof refused to communicate with Jenkens beginning in mid-October 2006.

However, Ms. Felderhof made further written demands for her residence on November 14. Also, Ms. Felderhof was not served until November 16, and no lawsuit existed in October. Even if she failed to communicate in mid or late October, which did not happen, such failure cannot demonstrate a willful failure to appear because the lawsuit did not exist and there was no duty to appear. *Jenkens I*, 542 F.3d at 123, n.6 ("the duty to answer only arises after service has been perfected.").

Finding: Ms. Felderhof "refused" a Federal Express package.

There is no evidence that a Fed-Ex package was ever presented to Ms. Felderhof. Jenkens' Fed-Ex envelope was misaddressed. There is no evidence Ms. Felderhof was at the residence at the time of any alleged attempted delivery. The letter in the package was received by Ms. Felderhof via facsimile on October 26 anyway, plainly demonstrating she was not avoiding communications from Jenkens. Also, Ms. Felderhof was not served until November

16; any purported lack of communication in mid or late October cannot demonstrate a willful failure to appear. *Jenkens I*, 542 F.3d at 123, n.6 ("the duty to answer only arises after service has been perfected.").

Finding: Ms. Felderhof instructed her attorneys to destroy communications *regarding the litigation* and not to provide *her* forwarding information to Jenkens.

The district court's finding is based on an e-mail Jenkens included in the record wherein an attorney at a firm Felderhof used before Jenkens filed suit returned a facsimile to Jenkens, advising it that Ms. Felderhof would not accept communications from her ex-husband, John Felderhof.[2] John Felderhof had been sending embarrassing and abusive faxes to Felderhof at her home

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[2] On November 3, 2006, prior to Jenkens' lawsuit, an attorney at a firm Felderhof had previously used notified Jenkens:

> I am writing further to your facsimile of this morning to James Chapman. James Chapman left Ogier earlier this year and *we no longer act for Ms. Felderhof.* We have been instructed by Ms. Felderhof that *we are not to accept any communication from Mr. Felderhof or anyone on his behalf* and that *we are not to forward* any *such communication*. Accordingly, we are returning your facsimile to you by mail without reading the same. We have further been instructed that if we receive any further *such communication*, we are not to acknowledge it and we are simply to destroy it. We would be grateful if you would inform *Mr. Felderhof* of the above forthwith.

and at her attorneys' office. Understandably, Ms. Felderhof did not want to have to pay attorney time for her counsel to review inappropriate faxes received from her ex-husband. The instructions were given well before any dispute with Jenkens over the residence arose and before any "litigation" existed. Further, Ms. Felderhof maintained communication with Jenkens, which, at all times, knew where Ms. Felderhof was located and how to contact her. Ms. Felderhof did not move, change phone numbers or her fax number – there was no new forwarding information to provide. Additionally, pre-suit, pre-service conduct cannot evidence a willful failure to answer the lawsuit.

Finding: Ms. Felderhof was *actually aware* of the summons but chose to act as though she were not served with a summons.

The only testimony in the record on this point shows she was unaware of the summons. Also, in *Jenkens I*, the court held that the Court "must also assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their responsive duties under the circumstances." *Id.* at 123-24. This is the law of the case, which the district court failed to apply.

Finding: Ms. Felderhof disregarded court notices and Jenkens' filings (the only specific example cited in the order was the notice to appear at the January 5th hearing on the motion for entry of default).

The only evidence on this point is sworn statements that she never received any such notice. Jenkens did not send the notice of hearing until December 27, and it sent the notices to an invalid mailing address. Jenkens assured Ms. Felderhof would not receive its motion for default; notice of hearing; or its motion for summary judgment.

Finding: The court "doubts" Ms. Felderhof "seriously planned" to appear at the February pretrial scheduling conference in light of the absence of evidence concerning such things as travel arrangements and the lack of filing a certificate of interested parties.

The district court was obligated to resolve doubt in Ms. Felderhof's favor, not against her. In *Jenkens I*, the court held " . . . 'any doubt should . . . be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits.'" No authority supports an inference of willfulness based on the lack of filing a certificate of interested parties, particularly when other parties failed to file one as well.

On appeal, Jenkens failed to address the district court's findings in support of willfulness. During

argument, the Panel noted, during its questioning of Jenkens' counsel, that Jenkens did not address in its brief each of the principal erroneous factual findings by the District Court. (*See* Oral Argument at 25:58). In short, Jenkens cannot defend the indefensible. So, it remained silent.

Rather than reverse the district court's order based on clear error, the Fifth Circuit deviated from the applicable abuse of discretion review standard, which must focus on the district court's actual factual findings. Rather than focus its inquiry on the *Pioneer* factors, or even ask whether the factual findings are clearly erroneous, the Court asked whether it could affirm the judgment as a whole despite that it rests upon an unsound factual foundation. During argument, the panel asked whether the order could be affirmed *despite* the erroneous findings:

> "Well, I guess we don't review findings; well we do review findings, but we also review judgments. And even if you are focusing on four findings, you say all of them are clear error. . . . *But even if that's the case, you still have the fact that we found that she could not say she did not receive the summons.*"

(Oral Argument at 11:08) (emphasis added).

Under *Pioneer*, receipt of a summons or complaint alone does not satisfy the excusable neglect elements. Further, in *Jenkens I*, the Fifth Circuit acknowledged that actual service of a summons was not determinative even under the Fifth Circuit's "excusable

neglect" analysis *Id.* at 123. ("In sum, perfection of service is not determinative – *the defendant's knowledge of the perfected service*, and the defendant's actions *post-service* also play a role in measuring the willfulness of the defendant's default.") (emphasis added). With respect to Felderhof's knowledge of perfected service, the *Jenkens I* court held: "*we also must assume* that neither she nor her attorney ever saw the summons, and that they were *legitimately confused* as to their responsive duties under the circumstances." *Id.* at 124 (emphasis added). *Jenkens I* is the law of the case. If Ms. Felderhof and her Cayman Counsel never saw the summons, were unaware of it, and were legitimately confused about their responsive duties under the circumstances, how can receipt of the summons and complaint ever form the basis of an intentional failure to respond?

Ms. Felderhof has steadily, consistently, and undyingly pursued the return of her residence. She did not, and would not, willfully default so as to permit her counsel to deprive her of her real property in Virginia. All of the district court's findings are in error, and the Fifth Circuit's order in *Jenkens II* cannot be reconciled with its findings in *Jenkens I* or this Court's opinion in *Pioneer*.

CONCLUSION

For all of these reasons, Ingrid Felderhof requests this Court to grant her Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals and the District Court. Ms. Felderhof deserves an opportunity to appear in the lawsuit and fight for the return of her residence.

Respectfully submitted,

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REVISED August 26, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20642

JENKENS & GILCHRIST A PROFESSIONAL CORPORATION

Plaintiff-Appellee

v.

GROIA & COMPANY, A Professional Corporation

Defendant-Appellee

v.

INGRID FELDERHOF

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:06-cv-03590

(Filed Aug. 12, 2009)

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

PER CURIAM:*

AFFIRMED. *See* 5TH CIR. R. 47.6.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JENKENS & GILCHRIST, A PROFESSIONAL CORPORATION, Plaintiff, v. GROIA & COMPANY, A PROFESSIONAL CORPORATION, JOHN FELDERHOF, and INGRID FELDERHOF, Defendants.	§ § § § § § § § § § § § §	Civil Action No. H-06-3590

ORDER

Pending before the Court is Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document No. 23) on remand from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit directed the Court to issue a more detailed ruling explaining this Court's denial of Felderhof's motion pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure.

BACKGROUND

This dispute stems from legal services Jenkens & Gilchrist, a Professional Corporation, ("Jenkens") provided to John and Ingrid Felderhof (collectively

"the Felderhofs") between 1997 and 2006. During that time, Canadian and U.S. authorities were investigating the Felderhofs for their roles in Bre-X Minerals, Ltd., a mining corporation. To secure itself against the potential that government authorities might freeze or seize the Felderhofs' assets, Jenkens entered into a representation agreement with the Felderhofs. This agreement provided for a $1,000,000 retainer to be paid in cash or valuable assets. At the same time, the Felderhofs transferred to Jenkens all shares in Travis Close, Inc., a corporation solely held by the Felderhofs. The only asset owned by Travis Close, Inc. was a home in Williamsburg, Virginia. That home is the subject of dispute in this case.

Jenkens completed its legal representation of the Felderhofs in 2006. At that time, Defendant Ingrid Felderhof ("Felderhof") informed Jenkens she wished that Jenkens transfer the Virginia home back to her. Jenkens informed Felderhof that because there were competing claims to the home, Jenkens would be forced to file an interpleader action to determine the rightful owner of the property.

On November 14, 2006, Jenkens filed in this Court an interpleader action seeking a declaratory judgment determining the rightful owner of the Virginia home. Despite being personally served on November, 16, 2006, Felderhof never filed an answer

nor responded in any way to those pleadings.[1] Felderhof was then served with a copy of the Court's Order for Conference and Disclosure of Interested Parties (Document No. 2), which directed her to appear for a pre-trial conference and to file, within fifteen days, a certificate of persons or entities with a financial interest in the litigation.[2] Felderhof never filed the certificate.[3]

On December 15, 2006, Jenkens filed a request for entry of default against Felderhof. A hearing on the entry of default was scheduled for January 5, 2007. Felderhof was served with notice of the request and the hearing to be held on the entry of default. Felderhof never responded to the motion, nor did she appear at the hearing.

On January 5, 2007, the Court granted Jenkens's motion for entry of default. Subsequently, Jenkens, along with Defendants Groia, and John Felderhof, filed a joint motion for summary judgment asking the court to declare Jenkens the lawful owner of the Virginia home. On January 10, 2007, the Court granted the joint motion and entered final judgment declaring

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[1] Despite Felderhof's contention otherwise, the Fifth Circuit made clear the "record precludes Ms. Felderhof from establishing she was not served with a summons."

[2] Felderhof admits receiving the Court's Order for Conference and Disclosure of Interested Parties.

[3] The Court granted Jenken's Request for Entry of Default (Document No. 11) prior to the date of the pre-trial scheduling conference.

Jenkens the sole owner of Travis Close, Inc. and its only asset – the Williamsburg, Virginia home at issue here.

On February 22, 2007, Felderhof filed this motion to set aside the entry of default and vacate the final judgment pursuant to FED. R. CIV. P. 60(b)(1) and FED. R. CIV. P. 60 (b)(4). The Court denied Felderhof's motion. At the direction of the Fifth Circuit, the Court now sets out, in detail, an explanation of its denial of Felderhof's motion to vacate order on entry of default and set aside the final judgment under FED. R. CIV. P. 60(b)(1).

STANDARD OF REVIEW

The decision to grant or deny a motion to set aside an entry of default is within the sound discretion of the trial court. *In re Dierschke,* 975 F.2d 181, 183 (5th Cir. 1992). In determining whether to set aside a default, the Court is to consider: (1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; and (3) whether a meritorious defense is presented. *Id.* at 183. The Court may also consider other factors, including whether the public interest is implicated, whether there was a significant financial loss to the defendant, and whether the defendant acted expeditiously to correct the default. *Id* at 184. Generally, no single factor is controlling; a balancing should be employed to determine if good cause exists to set aside the default. *Id.* However, if the district court determines defendant

was willful in not responding to the claims against her, no other finding is required. *Id.* at 184-85 (noting that *willful* failure to respond "may constitute sufficient cause for the court to deny" relief from default). A finding that a party willfully failed to respond is a factual determination. *Id.* at 184 ("The factual determination – that the failure to answer was intentional – is reviewed under the clearly erroneous standard."). A defendant's default may not be willful if the defendant merely mistakenly assumes that she was not served with process. *See Lacy v. Sitel Corp.*, 227 F.3d 290, 292-93 (5th Cir. 2000). However, default may be willful if the defendant "chose to make a decision that he hadn't been served when, in fact, he had," and "chose to play games with the court." *Dierschke*, 975 F.2d at 184.

LAW & ANALYSIS

Though Felderhof communicated with Jenkens prior to the date the complaint was filed, beginning in mid-October 2006, she refused to communicate in any way with Jenkens. *Compare Lacy*, 227 F.3d at 292-93 (finding defendant's default not willful where defendant maintained communications with plaintiff regarding the litigation). Specifically, for instance, Felderhof refused to accept a Federal Express package containing a letter regarding the Virginia property sent by Jenkens on October 26, 2006. More egregiously, Felderhof instructed her attorneys not to accept any communications regarding the litigation – rather, she instructed her attorneys not to

acknowledge receipt of, and to "simply destroy," any such communication. *See* Jenkens & Gilchrist's Response to Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document 29), Exhibit 4. Nor were the attorneys allowed to provide Jenkens with forwarding information for Felderhof. This refusal to communicate with Jenkens extended beyond the date the lawsuit was filed and the time Felderhof was properly served.[4]

Moreover, this willfulness included Felderhof's defiance toward orders of this Court. For example, Felderhof willfully ignored the Court's repeated instructions and attempts at contact, willfully ignored opposing counsel's attempts to contact her relative to the proceedings, and willfully failed to respond to the claims against her in this case. It was not until the Court entered a final judgment did Felderhof grasp the serious consequences of the "games" she played. *See Dierschke,* 975 F.2d at 183 ("[T]he plain and simple fact is that Mr. Dierschke chose to play games with this court."). Even then, more than thirty days passed before Felderhof filed her motion to set aside the entry of default and final judgment.

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[4] Despite the fact that Felderhof was properly, personally served with process and summons, she made a deliberate choice to act as though she had not been properly served with summons in an apparent attempt to avoid litigation.

Furthermore, the Court finds Felderhof's recent assertion that she "planned to attend" the pre-trial scheduling conference nothing more than an *ex post facto* attempt to excuse her deliberate disregard for the Court's earlier instructions.[5] Felderhof offers no evidence of this plan other than her own bare assertion – she presents no evidence that she had arranged travel accommodations, retained local counsel, or made any other preparations to attend such a hearing.

In sum, Felderhof did not merely neglect to file a response to the initial pleadings. Her subsequent actions make clear to the Court that Felderhof's failure to respond was due not to any excusable neglect, but was rather due to her calculated intent to eschew the Court's authority, ignore the realities of litigation, and frustrate the judicial process relative to this matter. *See id.* Felderhof treated this litigation, and her responsibilities as a party to it, with blatant disregard. Because the Court finds that Felderhof acted willfully in refusing to properly participate in the litigation, the Court declines to grant her the

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[5] The Court notes that the order in which Felderhof received notice of the pre-trial scheduling conference also contained an order directing Felderhof to submit to the Court a certificate of persons or entities with financial interest in the litigation. Felderhof failed to submit the certificate. The Court doubts that a party who seriously "planned to attend" the pre-trial scheduling conference would fail to submit the certificate as instructed by the Court.

relief she seeks from the consequences of her own conduct. *See id.* Accordingly, the Court hereby

ORDERS that Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document No. 23) is DENIED.

SIGNED at Houston, Texas, on this the 1 day of October, 2008.

/s/ David Hittner
DAVID HITTNER
United States District Judge

542 F.3d 114

United States Court of Appeals,
Fifth Circuit.

JENKENS & GILCHRIST, A Professional Corporation, Plaintiff-Appellee,
v.
GROIA & COMPANY, A Professional Corporation, Defendant-Appellee,
v.
Ingrid Felderhof, Defendant-Appellant.

No. 07-20296.

Aug. 26, 2008.

Daniel V. Flatten (argued), Nancy Hahn Elliott, Porter Hedges, Houston, TX, for Plaintiff-Appellee.

Steven J. Knight (argued), Chamberlain, Hrdlicka, White, Williams & Martin, Houston, TX, for Ingrid Felderhof.

Thomas Mente Benjamin (argued), Alan H. Goodman, Lemle & Kelleher, New Orleans, LA, for Groia & Co.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and DAVIS and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Ingrid Felderhof appeals the district court's denial of her motion, filed pursuant to FED.R.CIV.P. 60(b), to vacate the default judgment entered against

her. For the following reasons, we affirm in part, vacate in part, and remand.

I

During 1997, John Felderhof and his wife, Ingrid Felderhof, were under investigation by the Canadian government and the United States' Securities and Exchange Commission regarding the development of gold mining prospects by Bre-X Minerals, Ltd. Mr. Felderhof was a director and senior executive with Bre-X. In response to the investigations, the Felderhofs obtained legal representation from Jenkens and Gilchrist ("Jenkens"). Worried that the Felderhofs' assets may be frozen or seized as a result of the investigations, Jenkens entered into the Modified Legal Representation Agreement (the "Agreement") with the Felderhofs. Aside from payment for hourly fees, the Agreement provided that Jenkens was to be paid a non-refundable $1-million-dollar retainer. This retainer was to be paid in cash or valuable assets. Around the same time that she entered into the Modified Agreement, Ms. Felderhof transferred to Jenkens all of the shares of Travis Close, Inc. The sole asset of Travis Close was a home in Williamsburg, Virginia.[1]

In 2006, after Jenkens completed its work for the Felderhofs, Ms. Felderhof sent a letter to her counsel

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[1] Ms. Felderhof also transferred to Jenkens a Lamborghini automobile that was subsequently sold by Jenkens.

at Jenkens suggesting that they arrange to transfer the Williamsburg home back to her. Her letter claimed that Jenkens only agreed to hold the home as "caretaker," and that once all fees were paid that the home would be returned to her. Counsel from Jenkens responded, explaining that Jenkens was not merely "caretaker" of the home, and that because there were competing claims to the home, Jenkens could be forced to commence an interpleader action.

Jenkens subsequently filed an interpleader complaint in the Southern District of Texas to finally resolve ownership of Travis Close, Inc. and the Williamsburg home. The complaint named Groia & Company (a Canadian law firm that had represented the Felderhofs and claimed an interest in proceeds from the sale of the residence), John Felderhof, and Ingrid Felderhof as defendants. Groia and John Felderhof filed answers admitting most of the factual allegations in Jenkens' interpleader complaint. Ms. Felderhof did not file an answer. The facts surrounding Ms. Felderhof 's failure to file an answer are as follows.

On November 16, 2006 in the Cayman Islands, Ms. Felderhof was personally served with a packet of papers including Jenkens' complaint. The parties dispute whether these papers included a summons as required under FED. R. CIV. P. 4. Upon receiving these papers, Ms. Felderhof took them to the offices of her lawyer, John Chapman, in Grand Cayman. Chapman was out of the country and did not return until

November 28. Upon return, he reviewed the papers brought to his office by Ms. Felderhof.

Subsequently, Ms. Felderhof was served with a copy of the district court's Order for Conference and Disclosure of Interested Parties. The order required counsel to appear for a pre-trial conference and file a certificate of persons or entities with a financial interest in the litigation within fifteen days. Ms. Felderhof never filed the requisite certificate.

Because Ms. Felderhof never filed an answer, Jenkens filed a motion for entry of default as to Ms. Felderhof which was granted by the district court. Jenkens, Groia, and John Felderhof then filed a joint motion for summary judgment seeking to have the court declare, *inter alia,* that Jenkens is the sole and lawful owner of the stock of Travis Close, Inc. and its sole asset, the Williamsburg home. The district court granted the joint motion and entered final judgment declaring Jenkens the sole owner.

After learning of the default judgment against her, Ms. Felderhof filed a motion in the district court to have the default judgment set aside pursuant to FED. R. CIV. P. 60(b)(1) and FED. R. CIV. P. 60(b)(4). Rule 60(b)(1) provides that a party may be relieved from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." Ms. Felderhof argued that her neglect in failing to answer was excusable under FED. R. CIV. P. 60(b)(1) because she was never served with a summons, or in the alternative because the summons was lost prior to her or her attorney

ever seeing it; and that she never learned of her duty to answer. Rule 60(b)(4) provides that a party may be relieved from a final judgment if it is determined that "the judgment is void." Ms. Felderhof argued that the default judgment was void under FED. R. CIV. P. 60(b)(4) because she was never served with a summons, and thus, the court never had personal jurisdiction over her. After receiving briefing, affidavits, and documentary evidence, the district court summarily denied Ms. Felderhof 's motion.

II

The district court's order provided no factual finding as to whether Ms. Felderhof was served with a summons. Nor did the district court address any of the factors traditionally considered in determining whether relief from a default judgment is proper under Rule 60(b)(1).

We review *de novo* a district court's conclusion as to whether a judgment is void for lack of personal jurisdiction under Rule 60(b)(4). *See Goetz v. Synthesys Technologies, Inc.*, 415 F.3d 481, 483 (5th Cir.2005). We review the district court's denial of relief under Rule 60(b)(1) for abuse of discretion. *See Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir.2000). "Because of the seriousness of a default judgment, and although the standard of review is abuse of discretion, even a slight abuse of discretion may justify reversal." *Lacy*, 227 F.3d at 292. We normally review the district court's factual conclusions for clear error.

See Lacy, 227 F.3d at 292 (noting that factual determinations underlying a 60(b)(1) denial are reviewed for clear error); *Goetz,* 415 F.3d at 483 (noting that clear error applies to factual findings related to 60(b)(4) rulings). However, in this circumstance, we analyze the district court's denial of relief under Rule 60(b)(1) and 60(b)(4) in light of the lack of findings provided by the district court.

III

A

We turn first to Ms. Felderhof's argument under Rule 60(b)(4). On appeal, Ms. Felderhof argues that the district court's judgment was void under Rule 60(b)(4) because she was not served with a summons as required under Rule 4. *See* FED. R. CIV. P. 4(c) ("A summons must be served with a copy of the complaint."); *Recreational Props., Inc. v. Southwest Mortgage Serv. Corp.,* 804 F.2d 311, 314 (5th Cir.1986) ("If a court lacks jurisdiction over the parties because of insufficient service of process, the judgment is void and the district court must set it aside.").[2] While the

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[2] Ms. Felderhof's only contention under Rule 60(b)(4) relates to her failure to receive a summons. Ms. Felderhof raises no argument that personal service of both the complaint and summons would not satisfy the process requirements of Rule 4(f)(1). Rule 4(f)(1) provides that an individual in a foreign country may be served "by any internationally agreed means of service . . . such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." FED.R.CIV.P. 4(f)(1).

(Continued on following page)

district court failed to resolve the disputed facts surrounding the service of summons, FED.R.CIV.P. 52(a)(3)[3] indicates that a district court is not required to state findings or conclusions when deciding a Rule 60(b) motion. Moreover, even where findings are specifically required at the conclusion of a bench trial, under FED.R.CIV.P. 52(a)(1), we have recognized that a remand for specific findings is unnecessary "if a complete understanding of the issues may be had without the aid of separate findings." *Armstrong v. Collier,* 536 F.2d 72, 77 (5th Cir.1976). "[A] remand is often deemed unnecessary if all the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all the facts relied upon to support the judgment are in the record and are undisputed, or if the record as a whole presents no genuine issue as to any material fact." *Id.* We have also stated that a remand is not necessary if "the record would not support" a finding in the appellant's

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Ms. Felderhof also contends that she did not receive "proper notice" of Jenkens application for default judgment pursuant to FED.R.CIV.P. 55(b)(2). However, the notice requirement of Rule 55(b)(2) only applies to parties that have "appeared" prior to the entry of a default judgment. While "we have taken an expansive view as to what constitutes an appearance under Rule 55(b)(2)," Ms. Felderhof made no contact with the court or opposing parties until after the entry of default judgment. *Rogers v. Hartford Life & Acc. Ins. Co.,* 167 F.3d 933, 936 (5th Cir.1999).

[3] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." FED.R.CIV.P. 52(a)(3).

favor, and if such a finding would be deemed clearly erroneous had it been made. *See Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477, 483 (5th Cir.1981). Applying the above rule to determine whether a remand is necessary in this instance, we ask whether the record could support a finding in Ms. Felderhof 's favor as to the service of the summons.

The evidence before the district court concerning service of the summons was as follows. Jenkens submitted a copy of a signed return of service form. Jenkens also submitted two affidavits from the process server. The process server averred that he personally served the complaint and summons on Ms. Felderhof at a Grand Cayman shopping mall on November 16, 2006. Finally, Jenkens submitted a copy of a summons directed to Ms. Felderhof that had been issued by the district court on November 14, 2006 and initialed by the process server. The process server averred that he initialed a copy of the summons upon serving Ms. Felderhof. Ms. Felderhof submitted affidavits from herself and Chapman, her attorney in the Cayman Islands. Ms. Felderhof admitted that she was served with a bundle of what looked like "legal papers" while at a shopping mall on November 16. However, she averred that she did not review the papers served on her. Instead, she took them to Chapman's office on November 16. Chapman was out of the country until November 28. Chapman averred that upon returning to his office he reviewed the papers that had been dropped off by Ms. Felderhof twelve days prior. His affidavit states that, on

November 28, there was no summons amongst the papers he reviewed.

The only evidence that could support Ms. Felderhof's position is the averment by her attorney that, 12 days after service, the summons was not in the pack of papers in his office. The statement of her attorney regarding the content of the pack of papers on November 28 does not rebut the process server's affidavit, and it does not create a material issue of fact as to whether Ms. Felderhof was served with a summons on November 16. The record cannot support a finding in Ms. Felderhof's favor, and had the district court concluded that Ms. Felderhof was not served with the summons, such a finding would have been clearly erroneous. Accordingly, the district court did not err in denying Ms. Felderhof relief from the default judgment under Rule 60(b)(4) based on her claim that she was not served with a summons.

B

We next consider Ms. Felderhof's claim for relief from the default judgment under Rule 60(b)(1). In determining whether good cause exists to set aside a default judgment under Rule 60(b)(1) we examine the following factors: "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *In re Dierschke,* 975 F.2d 181, 183 (5th Cir.1992). Courts may also consider whether the public interest was implicated, whether there was significant financial

loss to the defendant, and whether the defendant acted expeditiously to correct the default. *See id.* at 183-84. The district court need not consider all of the above factors in ruling on a defendant's 60(b)(1) motion; "the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause.'" *Id.* at 184.

However, two of the above factors carry special significance. A district court has the discretion to refuse to set aside a default judgment under 60(b)(1) if the defendant "fails to present a meritorious defense sufficient to support a finding on the merits for the defaulting party." *Lacy,* 227 F.3d at 293. Also, if a district court finds a defendant's default to be willful, then the district court need not make any other finding. *See Dierschke,* 975 F.2d at 184.

The district court reached no finding as to willfulness, prejudice, or the merit of Ms. Felderhof's asserted defenses. Nor did the district court provide any indication as to whether the remaining factors favor granting or denying relief from the default judgment under Rule 60(b)(1). Again applying the above-stated rule that remand is unnecessary where the record would not support a finding in Ms. Felderhof's favor, we examine the above factors to determine whether the district court's 60(b)(1) denial

may be affirmed despite the lack of specific findings by the district court.[4]

We first address whether Ms. Felderhof has presented a meritorious defense. In her motion to set aside the default judgment, Ms. Felderhof's most basic defense on the merits was to deny Jenkens' factual allegations regarding the transfer of the Travis Close stock and the Williamsburg home. Jenkens claimed that the stock and home were part of its $1 million non-refundable retainer under the Modified Agreement. Ms. Felderhof claimed that the parties reached a different agreement which provided that Jenkens held the stock and the home to secure payment of fees, and that Jenkens would return the home to her once Jenkens' fees were paid.

To support its claim to the residence, Jenkens submitted to the district court the Modified

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[4] Because of the drastic nature of default judgments, the Third Circuit has indicated that a district court errs if it denies a motion to set aside a default judgment under 60(b)(1) without addressing certain necessary factors. *See Emcasco Ins. Co. v. Sambrick,* 834 F.2d 71, 73-74 (3d Cir.1987) (reversing district court where it based its decision on a defendant's delay in answering without addressing prejudice or meritorious defense elements). While we agree that findings are useful for appellate review, they are not required under Rule 52(a), and therefore a lack of findings does not *per se* result in reversal or vacatur. *See Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 96-97 (2d Cir.1993) (noting that a district court should provide specific reasons but that a lack of explanation for denying relief from default is not fatal "so long as it is possible to discern that the appropriate criteria have been satisfied").

Agreement. The Modified Agreement was signed by the Felderhofs on May 16, 1997 but was intended to "memorialize[ ] the revised agreement [the parties] reached conceptually on May 6." The Modified Agreement does not, by its terms, refer to the stock of Travis Close or the Williamsburg home as being part of the $1 million non-refundable retainer. The Modified Agreement simply states that the retainer can be paid with "cash or other valuable assets." The Agreement states that Jenkens had received "certain assets of uncertain value" but does not identify the stock or the home as part of the "valuable assets" used to satisfy the retainer. Jenkens also provided the affidavit of Andrius Kontrimas, a Jenkens attorney, who served as Ms. Felderhof's counsel. Kontrimas averred that the stock transfer was "part of the consideration for the Modified Agreement" and that Ms. Felderhof agreed to transfer the Residence "free and clear of any liens or encumbrances." An affidavit from Joseph Groia, the Felderhofs' Canadian counsel states that "[a]t the time of entering into the agreement with Heenan Blaikie [the predecessor law firm to Groia & Company], the Felderhofs agreed to assign a non-cash asset for both the benefit of Jenkens and Heenan Blaikie. The non-cash asset was the stock of Travis Close." Jenkens submitted two stock certificates – one dated January 2, 1997 indicating Ms. Felderhof's ownership of the Travis Close stock, and another dated December 30, 1997 indicating Jenkens' ownership of the Travis Close stock. Jenkens also submitted what appears to be a blank stock transfer agreement signed by Ms. Felderhof on May 6, 1997.

The blank agreement does not contain any information other than the date and Ms. Felderhof's signature. Finally, Jenkens argued that its payment of income tax on the home in 1997, and its maintenance of the home over ten years show that Ms. Felderhof intended to transfer full ownership of the Travis Close stock and the Williamsburg home.

To support the factual allegations in her defense, Ms. Felderhof presented her own affidavit, as well as letters exchanged between her and Kontrimas in 2006 regarding the Williamsburg home.[5] Ms. Felderhof's affidavit states that "Andrius assured me that my house in Virginia would be maintained by his firm and returned to me after the firm's engagement was concluded if all outstanding bills to his firm were paid in full. It was Andrius's promises to maintain the house and return it to me if and when I paid all of his firm's legal fees that led me to transfer the house to his firm." Prior to Jenkens' filing its interpleader complaint, Ms. Felderhof wrote two letters to Kontrimas. They reinforce her alleged understanding of the agreement regarding the Travis Close stock and the Williamsburg home. In the letters, Ms. Felderhof

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[5] Ms. Felderhof also submitted an affidavit from her Cayman counsel, Chapman. However, because Chapman did not represent Ms. Felderhof until 1999, he provides no testimony based on personal knowledge of the 1997 stock transfer. However, his affidavit does state that, "Mrs. Felderhof always told me that her understanding was that the residence would have to be returned to her after the firm's engagement was concluded if all outstanding bills to [Jenkens] were paid in full."

requests that Jenkens arrange to transfer the home back to her. In response to Ms. Felderhof's letters, Kontrimas wrote that "There was never a caretaker arrangement." However, his letter also states that "I did tell you that my Firm and I would do the right thing regarding Travis Close," and that "other than reimbursement of the fees, expenses, and income tax" associated with Jenkens' holding the house for the previous ten years, "my law firm is not claiming any interest in the house or proceeds of sale." His letter continues, "We have attempted to follow what I thought was the right thing to do under the terms of our agreement and current circumstances. Unfortunately, there does not appear to be an agreement with my suggested course of action." Finally, Kontrimas indicates in his letter that if a law suit was commenced, he would "likely . . . be a fact witness in the litigation to testify as to the facts surrounding the legal engagement and continuing representation." Ms. Felderhof argues that Kontrimas' letter supports her contention that there was an agreement regarding transfer of the stock and the home that did not involve the assets becoming part of Jenkens' nonrefundable retainer. Ms. Felderhof also argues that Jenkens' holding the home for ten years without selling it provides circumstantial support for her understanding: that Jenkens only held the home as security until all fees were paid, when it would be returned to her.

The record clearly supports the fact that Ms. Felderhof transferred the stock of Travis Close to

Jenkens. However, with regard to the details of the transfer of the Travis Close stock and the Williamsburg home, the record on appeal essentially reduces to a swearing match by affidavit. Kontrimas and Groia aver that the stock and home were transferred outright to fulfill the retainer obligation set forth in the Modified Agreement, while Felderhof avers that the assets were transferred merely as security to ensure payment of fees. Ms. Felderhof's motion and the evidence submitted to the district court provided definite factual allegations, as opposed to mere legal conclusions, in support of her defense. *See Moldwood Corp. v. Stutts,* 410 F.2d 351, 352 (5th Cir.1969) (stating that a defendant must make a "clear and specific showing . . . by [a] definite recitation of facts" that the defendant has a valid defense). And her "defense is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 98 (2d Cir.1993); *see* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure: Civil 3d § 2697 (1998) ("The underlying concern is to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default."). Because Ms. Felderhof provided definite factual allegations with supporting record evidence that, if believed at trial, would lead to a result contrary to that achieved by the default, we cannot assume that the district court rested its denial of Rule 60(b)(1) relief on the lack of a meritorious

defense. *Cf. Gomes v. Williams,* 420 F.2d 1364, 1366 (10th Cir.1970) (noting that "bald allegation, without supporting facts underlying the defense, will not sustain the burden of the defaulting party under Rule 60(b)").

Next, we note that a number of the other factors listed in *Dierschke* arguably cut in favor of Ms. Felderhof. Along with her potentially "meritorious" defense, Ms. Felderhof claims that she stands to suffer a "significant financial loss," because the home is currently listed for sale at approximately $1.3 million. *See Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 403 (5th Cir.1981) (recognizing that the large value of a $250,000 claim against the defendant "itself militat[ed] in favor of a full trial on the merits."). Also, Jenkens appears to present ineffectual claims of prejudice; its briefing on appeal merely refers to expected difficulties Jenkens may face if forced to proceed with further litigation. *See Lacy,* 227 F.3d at 293 (5th Cir.2000) (indicating that delay, or requiring a plaintiff to prove his case does not constitute prejudice). Finally, Ms. Felderhof claims that she expeditiously responded once she learned of the default. Though it took her a month to obtain local counsel and file her motion for relief from judgment, she presented affidavit testimony from herself and Chapman indicating that she began her search for local counsel immediately but ran into a number of unexpected difficulties including slow responses from the local counsel she sought, and conflicts of interest that prevented others from representing her

in the matter. The district court did not address any of these factors.

Finally, we reach the issue of willfulness. If Ms. Felderhof's default was willful then the district court's denial of 60(b)(1) relief may be affirmed on that ground alone. *See Dierschke,* 975 F.2d at 184-85. Again, the district court made no finding as to willfulness, so in considering whether a remand is necessary, we must ask whether the record precludes a finding in Ms. Felderhof's favor.

We have already determined that the record precludes Ms. Felderhof from establishing she was not served with a summons. But this fact is not dispositive of Ms. Felderhof's willfulness. We have recognized that even where a defendant mistakenly concludes that he was not served with process, the defendant's default may not be willful. *See Lacy,* 227 F.3d at 292-93 (Where defendant mistakenly assumed it was not served but maintained contact with plaintiff concerning matter of litigation, default was not willful.). On the other hand, we have affirmed a lower court's finding of willfulness where the lower court determined that the defendant simply "chose to play games with the court" and "chose to make a decision that he hadn't been served when, in fact, he had." *Dierschke,* 975 F.2d at 184. In sum, perfection of service is not determinative – the defendant's knowledge of the perfected service, and the defendant's actions post-service also play a role in measuring the willfulness of a defendant's default.

Ms. Felderhof contends that even if there was a summons in the papers served on her, it was inadvertently lost; and thus, neither she nor her counsel ever knew of the duty to answer the complaint. She contends that her claims to ownership of the Williamsburg home, evidenced in her letters to Kontrimas, suggest that she would not allow a default judgment to be entered against her because such a judgment would deprive her of any interest in the home. She also claims that her expeditious forwarding of all legal papers to her attorney shows that she did not intend to avoid litigation or "play games" with the court.

Nonetheless, even were the summons never seen, Ms. Felderhof received other forms of notice of the interpleader action.[6] Chapman saw the complaint in his office twelve days after Ms. Felderhof was served. Ms. Felderhof also admits that she later received an order for a pre-trial scheduling conference. She and Chapman aver that they intended to be at the conference (which never occurred because of the entry of

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[6] Jenkens contends that Ms. Felderhof willfully evaded service, thus suggesting willfulness in her failure to answer. Even were we to accept Jenkens' claims of willful evasion of service (which Ms. Felderhof disputes), intentionally evading service is "insufficient to make a defendant's failure to answer willful," *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 374 (D.C.Cir.1980), because the duty to answer only arises after service has been perfected. *Cf. Lacy*, 227 F.3d at 292 n. 5 (noting that willful evasion of service is not grounds to support an entry of default).

default), because they assumed that the conference would yield greater detail as to what was required of Ms. Felderhof in light of never seeing the summons nor receiving further instructions for answering the complaint. As the conference never occurred, Ms. Felderhof did not have the opportunity to make good on what she now avers to have been her intent to attend. Still, she contends that her plan to attend supports her claim that she did not seek to avoid litigation of the matter. Finally, despite receiving the complaint and the order for conference, the only recourse actually taken by Ms. Felderhof prior to entry of default was to check the local court registry in Grand Cayman for any pending filings against her.

Because there are no countervailing equities (*i.e.*, because Jenkens has not presented a legitimate claim of prejudice that would arise from setting aside the default), "any doubt should, as a general proposition, be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits." *Gen. Tel. Corp. v. Gen. Tel. Answering Serv.*, 277 F.2d 919, 921 (5th Cir.1960). While there is evidence suggestive of willfulness on the part of Ms. Felderhof, resolving doubts in Ms. Felderhof's favor, we do not believe the record conclusively shows that her default was willful. Shortly prior to the filing of the complaint, Ms. Felderhof engaged in regular correspondence with Jenkens concerning the dispute over the Williamsburg residence. As the record reflects her contemporaneous intent to claim ownership of the Williamsburg residence, it would be quite strange for Ms. Felderhof

to willfully default when doing so would destroy her interest in the home. Moreover, assuming a summons was served, resolving doubt in Ms. Felderhof's favor, we also must assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their responsive duties under the circumstances. Finally, while the initial scheduling conference never occurred, we cannot entirely discount the sworn affidavit testimony from Ms. Felderhof and her attorney that they planned to attend the pre-trial conference under the mistaken assumption that the conference would yield further guidance with respect to the interpleader complaint received from Jenkens. While Ms. Felderhof was not the model of a properly responsive defendant, we cannot say that this sparse record *requires* a court to find her default willful.

As noted above, a number of the factors relevant to a good cause determination under Rule 60(b)(1) appear to cut in Ms. Felderhof's favor – and the record does not indisputably support a denial of Rule 60(b)(1) relief on "willfulness" grounds. While the record does not require a finding of willfulness, neither does the record preclude such a finding. Without guidance from the district court as to the basis for its Rule 60(b)(1) decision, we cannot determine whether the district court abused its discretion; and we are, thus, constrained to vacate this portion of the district court's order. *See Enron Oil,* 10 F.3d at 96-97 (noting that a district court's lack of findings or explanation

in support of its Rule 60(b) denial may "defeat intelligent appellate review").

IV

For the foregoing reasons, we AFFIRM the district court's denial of relief from default judgment under Rule 60(b)(4). We VACATE the district court's denial of relief under Rule 60(b)(1) and REMAND. If, on remand, the district court determines that its denial of Ms. Felderhof's motion under Rule 60(b)(1) is supported by the current record, then the district court need only issue a more detailed ruling sufficient to resolve that which currently hinders our review. Otherwise, the district court is instructed to institute further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JENKENS & GILCHRIST, A PROFESSIONAL CORPORATION, Plaintiff, vs. GROIA & COMPANY, A PROFESSIONAL CORPORATION, JOHN FELDERHOF, and INGRID FELDERHOF Defendants.	§ § § § § § § § § § § § § § §	C.A. NO. C.A. NO. H-06-3590

FINAL JUDGMENT

(Filed Jan. 10, 2007)

Be it remembered that on this date there came on to be heard the Joint Motion for Summary Judgment of Plaintiff Jenkens & Gilchrist, a Professional Corporation ("Jenkens & Gilchrist") and Defendants Groia & Company and John Felderhof, and it appearing to the Court that such motion is well taken, the Court accordingly finds, orders and decrees:

1. That Jenkens & Gilchrist is the sole and lawful owner of the stock of Travis Close Inc. and its sole asset, the single family dwelling located at [Home Address Omitted], Williamsburg, Virginia,

legal description Lot 53 Travis Pond Governor's Land ("the Residence").

2. That neither Ingrid Felderhof nor John Felderhof own any interest in Travis Close Inc. and its sole asset, the single family dwelling located at [Home Address Omitted], Williamsburg, Virginia, legal description Lot 53 Travis Pond Governor's Land, the Residence.

3. That Jenkens & Gilchrist and Groia & Company are entitled to one half of the net proceeds from the sale of Travis Close Inc., and its sole asset, the Residence.

4. That Ingrid Felderhof and John Felderhof are enjoined from instituting any action or proceeding in any other court for a determination of the ownership of the stock of Travis Close Inc. and its sole asset, the Residence, and/or for a claim to proceeds for its sale.

5. That Jenkens & Gilchrist, Groia & Company and John Felderhof are released and discharged from any further liability with regard to the Travis Close Inc. and the sale of its sole asset, the Residence.

6. That Jenkens & Gilchrist recover its reasonable and necessary attorneys' fees and taxable costs of Court, and any charges, fees, taxes or other expenses incident to the upkeep, management, and sale of the Residence.

Signed this 9 day of January, 2007.

/s/ David Hittner
United States
District Judge Presiding

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20642

JENKENS & GILCHRIST
A PROFESSIONAL CORPORATION

Plaintiff-Appellee

v.

GROIA & COMPANY, A Professional Corporation

Defendant-Appellee

v.

INGRID FELDERHOF

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Sep. 14, 2009)

Before JONES, Chief Judge, and PRADO, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing DENIED

ENTERED FOR THE COURT:

/s/ Edward C. Prado
United States Circuit Judge